Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1996.

MARIE EVANS, BY AND THROUGH HER MOTHER AND NEXT FRIEND, MURIEL EVANS,
Petitioner,

v.

TERRACE AVERY, JOHN J. GREENE AND CITY OF BOSTON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the First Circuit correctly concluded that the "shocks and conscience" test is appropriate to determine violations of Fourth Amendment liberty interest in police pursuit cases where the pursued party causes injury to a bystander during the pursuit.

2. Whether the Petitioner adduced sufficient evidence at trial to warrant submission of the case to a jury on the claim of a violation of substantive due process.

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RESPONDENTS' BRIEF IN OPPOSITION.

STATEMENT OF THE CASE

Respondents are satisfied with the Petitioner's statement of the case and prior proceedings. Pursuant to Supreme Court Rule 16.2 those sections are not repeated in this brief.

STATEMENT OF THE FACTS

The Petitioner has given a statement of facts in her brief which did not include all the evidence regarding what the Re-

spondents witnessed and the conclusions they made regarding their observations. Although the Court must view the facts in the light most favorable to the Petitioner, the respondents' testimony concerning their observations as they drove on Centre Street is largely unrebutted and crucial to a review by this Court. At the time of the accident which injured Marie Evans, the respondent John J. Greene was a twenty-two- (22) year veteran of the Boston Police Department and had served as a detective with the Drug Control Unit for twelve (12) years and received various specialized training in drug control practices. (A. 46, 1051-52). Respondent Terrace Avery was a thirteen- (13) year veteran police officer and had served seven (7) years in the Drug Control Unit and likewise received various specialized education and training. (A. 53, 1015). The detectives patrolled the Dorchester neighborhood for the very purpose of detecting and deterring drug trafficking. (A. 53, 1051-52). Both detectives lived and worked in Dorchester and were very knowledgeable of the area. (A. 514).

The entire incident took perhaps one or two minutes. (A. 1022-57). While driving east on Centre Street these trained and very experienced narcotics detectives observed activity which they deemed suspicious. The suspect appeared startled at recognizing the police officers, who were in an unmarked police vehicle, and hurriedly walked to a Cutlass Oldsmobile. The suspect threw a paper bag through the open window, said something excitedly in Spanish to a passenger and then got in the driver's seat and drove away. (A. 517-19, 1054-58). At this point in time the officers made a U-turn and approached the rear of the suspect's vehicle and, at some point beyond Clementine Park while driving west, the officers momentarily activated the emergency lights and siren expecting the suspects to stop. The suspects were then going approximately 20-25 miles per hour and there were no pedestrians or vehicular traffic in the area. (A. 521-23). Although the officers expected

the suspects to stop, they did not. Instead, the suspects increased their speed to 30 to 40 miles per hour. (A. 523). The officers followed and again put on their police siren and emergency lights in an effort to stop the suspects. Almost immediately the officers witnessed the suspects place small items in their mouths and pass a jug of water back and forth. (A. 527). The detectives knew that ingestion was a favored means of drug disposal used by drug dealers in the area (A. 583-86); that local drug dealers typically carried only small "stashes" of drugs which they hide at various places in the neighborhoods (A. 583-86); and that drug dealers would typically submit to police authority once they ingested the drugs. (A. 533-55, 1019-23, 1054-58). The officers decided they had probable cause to arrest the suspects. The officers notified the police dispatcher that they were in pursuit of the suspects. (A. 582). At that time, there still were no pedestrian or vehicular traffic in the area. (A. 545-46). The officers continued to pursue the suspects on Centre Street heading to Washington Street. The suspects drove at a steady 30 to 45 miles per hour and stayed on the right hand side of the road. (A. 1054-58). When the suspects approached Washington Street their vehicle went into the left lane of Centre Street to bypass several cars waiting at a red light. They entered Washington Street, turned left and struck the petitioner Marie Evans as she crossed Washington Street near Epping Street, approximately 300 feet away from Centre Street. (A. 1020). The entire incident took less than two minutes.

ARGUMENT

THIS COURT SHOULD DENY PETITIONER'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE FIRST CIRCUIT ADOPTED AND APPLIED APPROPRIATE UNITED STATES SUPREME COURT PRECEDENT.

This Court should deny petitioner's writ of certiorari because the First Circuit appropriately applied United States Supreme Court precedent when it adopted the "shocks the conscience" standard to determine liability under 42 U.S.C. § 1983 for injuries emanating from police conduct creating a dangerous situation. Furthermore, with the exception of the Ninth Circuit, circuits addressing similar issues have also adopted the "shocks the conscience" standard. Finally, the First Circuit determined that it would have dismissed petitioner's claims under a less demanding standard because respondents' conduct was, at most, negligence. Since altering the standard to one of "reckless disregard to the plaintiff" would not alter the outcome, this Court should deny certiorari.

A. *The First Circuit correctly used the "shocks the conscience" standard to measure the police conduct in pursuit cases under the Fourteenth Amendment.*

1. The First Circuit correctly used the "shocks the conscience" standard because it was following United States Supreme Court precedent.

The First Circuit correctly adopted the "shocks the conscience" standard to determine police and municipal liability in pursuit cases where the pursued party causes the claimant's injuries. This Court unanimously advanced the "shocks the conscience" standard to decide whether creating dangerous situations leading to injuries violates the Fourteenth Amend-

ment's substantive due process clause. *See Collins* v. *City of Harker Heights, Texas*, 503 U.S. 115 (1992). Petitioner alleges that the police officers violated her civil rights under the Fourteenth Amendment because her injuries arose from their dangerous high speed automobile pursuit of suspected drug dealers. (A. 17). As in *Collins*, petitioner seeks damages under § 1983 for violation of her Fourteenth Amendment rights because respondents created an unreasonably dangerous situation. *See Collins*, 503 U.S. at 117. Since the petitioner's allegations parallel those in *Collins*, it is appropriate to use the *Collins* standard. Therefore, the First Circuit correctly adopted the "shocks the conscience" standard to dismiss petitioner's substantive due process claim as a matter of law. *See Evans* v. *Avery*, 100 F.3d 1033 (1st Cir. 1996).

2. The First Circuit correctly adopted the "shocks the conscience" standard because other circuits use the standard to decide similar issues.

The First Circuit's application of the "shocks the conscience" standard is in harmony with the precedent of other circuits. Except for the Ninth Circuit, circuit courts addressing matters similar to the case *sub judice* (*i.e.*, where the alleged due process violation arises from danger created by the state actor) have adopted the "shocks the conscience" standard. *See Fagan* v. *City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (*en banc*) ("*Collins* . . . has now redefined or at least clarified the relevant inquiry when petitioners rely on substantive due process as the basis of the constitutional tort."); *Lewellan* v. *Metropolitan Government of Nashville*, 34 F.3d 345, 350 (6th Cir. 1995) (holding that the "gross negligence" standard it had adopted for substantive due process claims in *Nishiyama* v. *Dickson County*, 814 F.2d 277 (6th Cir. 1987) was no longer good law because it could not be reconciled with the "shocks the

conscience" standard established in *Collins* v. *Harker Heights, Texas, supra*); *Uhlrig* v. *Harder*, 64 F.3d 567 (10th Cir. 1995); *Parton* v. *City of Bentonville*, 901 F.Supp. 1440, 1443 (W.D. Ark. 1995) (dismissing the substantive due process claims stemming from a police pursuit because the Eighth Circuit would likely adopt the "shocks the conscience" standard in such actions). The First Circuit applied the correct standard and there is no reason for this Court to grant certiorari.

Even before *Collins*, the Fourth Circuit held that the "shocks the conscience" standard was an appropriate measure of police conduct in pursuit cases to determine substantive due process violations. *See Temkin* v. *Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992). Significantly, the first issue for review in the petition for writ of certiorari in the *Temkin* case was:

> Did the Court of Appeals for the Fourth Circuit err in adopting a standard of "shocks the conscience" for a substantive due process violation under 42 U.S.C. § 1983, when all other circuit courts have adopted standards ranging from gross negligence to "recklessness" to "deliberate indifference" for similar conduct?

This Court denied the petition for a writ of certiorari in the *Temkin* case just two days before issuing the *Collins* decision.[1] The court below considered this timing significant, concluding that *Temkin*'s timing suggests that *Collins* "shocks the conscience" standard controls police pursuit cases.

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[1] The timing of the denial of a writ of certiorari in the *Temkin* case was noted in the trial court's opinion in this case. *See Evans*, 897 F.Supp. 21 (D. Mass. 1995).

3. The First Circuit correctly adopted the "shocks the conscience" standard because it is in accord with important policy concerns.

Policy considerations and pragmatic concerns have shaped substantive due process analysis.[2] At the core is the concern that there are too many run-of-the-mill tort claims brought in federal court under the rubric of due process which should be brought in state court instead — if at all. *See Collins*, 112 S.Ct. 1068; *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (expressing concern at making the Fourteenth Amendment a "font of tort law"). This view is not just a superficial pragmatic concern to control court dockets, but, rather subsumes some basic societal concerns including determining the appropriate forum of such claims and resolving the natural tension between the exercise of governmental power and the rights of a free citizenry. The "shocks the conscience" standard discourages potential claimants from adding federal claims to average tort claims. It reinforces the notion that § 1983 is an extraordinary claim and not one to be linked to any tort claim. A potential claimant still has a valid state tort claim. In the case *sub judice*, petitioner received a damage award for her state claim. Therefore, this standard does not deprive the potential claimant of all remedies, just of an extraordinary one meant solely for extraordinary circumstances. This is in keeping with this Court's express desire to prevent the Due Process Clause from being "a font of tort law." *See Paul* v. *Davis*, 424 U.S. 693, 701 (1976). *See also Apodica* v. *Rio Arriba County Sheriff's Department*, 905 F.2d 1445 (10th Cir. 1990) (collisions between police vehicles in emergency situations and other vehicles clearly fall on the tort side of the law regardless that petitioners

[2] In an often-cited treatise, Professor Nahmod addresses judicial concerns of federalism, overdeterrence of state actors' conduct, overburdened federal courts, and the trivialization of the Constitution in civil rights litigation. Nahmod, *Civil Rights and Civil Liberties Litigation*, § 1:04 (3d Ed. 1991).

dress the claim in due process cloak). Therefore, the "shocks the conscience" standard serves the pragmatic function of limiting the number of run-of-the-mill tort cases brought under federal due process by assuring that on the spectrum of conduct by state actors from benign to morally depraved the gray area is set more towards the egregious conduct called for presently in due process analysis than towards the negligent conduct which is best left to state tort remedies.

Further, as the First Circuit states, this standard is appropriate to measure police pursuit cases. *See Evans*, 100 F.3d at 1038.[3] Society does not want to unduly burden police when they risk their lives in order to make ours safer. The law allows police to act in ways where there are known risks to the community. *See Smith* v. *Lexington Fayette Urban County Gov't*, 884 F.Supp. 1086, 1092 (E.D. Ken. 1995). "Given the known risks we are assuming as a community, this court must adopt the 'shocks the conscience' standard as the applicable one." *Patron* v. *City of Bentonville*, 901 F.Supp. 1440, 1444 (W.D.Ark. 1995). Police officers must take risks to capture criminals. The "shocks the conscience" standard allows police the freedom necessary to properly perform their duties without restraining their every act. Therefore, the First Circuit correctly adopted the "shocks the conscience" standard because it is in line with stated policy concerns.

Applying the "shocks the conscience" of the federal judge standard comports with this Court's precedents and is appropriate in light of the concerns encompassed in substantive due process analysis. Under this standard the petitioner in the present case has no claim against the respondents for certainly their conduct did not rise to the level of "shocks the conscience." Therefore, the Court should deny the petition for writ of certiorari.

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[3] The First Circuit refused to follow the Ninth Circuit decision for the very reason that the demands for law enforcement were not addressed in *Lewis* v. *Sacramento*, 99 F.3d 434.

B. *The First Circuit correctly determined the evidence insufficient to prove that the police officers' conduct was recklessly or callously indifferent to the petitioner's Fourteenth Amendment rights.*

The court below correctly concluded that petitioner's claim still must fail under a less stringent standard. This Court previously held that a state actor's mere negligent conduct does not offend the Due Process Clause. *See Daniels* v. *Williams*, 474 U.S. 327, 334 (1986). Therefore, any other standard used to determine a state actor's violation of Fourteenth Amendment rights under the Due Process Clause must fall between negligence and "shocks the conscience." *See id.* The trial court concluded that even if the "shocks the conscience" standard did not apply to police pursuit cases, the evidence fell far short of establishing respondents' reckless or callous indifference. *See Evans*, 897 F.Supp. 21. The First Circuit concluded that respondents' decision to pursue drug dealing suspects in a densely populated residential area during rush hour instead of taking alternative measures amounted to no more than possible negligence.

At the time of the accident which injured Marie Evans, the defendant John J. Greene was a twenty-two- (22) year veteran of the Boston Police Department and had served as a detective with the Drug Control Unit for twelve (12) years and received various specialized training in drug control practices. (A. 46, 1051-52). Defendant Terrace Avery was a thirteen- (13) year veteran police officer and had served seven (7) years in the Drug Control Unit and likewise received various specialized education and training. (A. 53, 1015). The detectives patrolled the Dorchester neighborhood to detect and deter drug trafficking. (A. 53, 1051-52). Both detectives lived and worked in Dorchester and were very knowledgeable of the area (A. 514).

The entire incident took perhaps one or two minutes. (A. 1022, 1057). To understand what transpired it is helpful to look at the incident in four distinct segments.

1. The Suspicious Activity

While driving east on Centre Street these trained and very experienced narcotics detectives observed activity which they deemed suspicious. The suspect appeared startled when he recognized respondents, who were in an unmarked police vehicle. The suspect then hurriedly walked to a Cutlass Oldsmobile, threw a paper bag through the open window, said something excitedly in Spanish to a passenger and then got in the driver's seat and drove away. (A. 517-19, 1054-58).

The officers had a lawful reason, indeed a duty, to conduct an investigatory stop of the suspect's motor vehicle. *See Commonwealth* v. *Lyons*, 409 Mass. 16, 19 (1990) (an investigatory stop of a motor vehicle is warranted when police have articulable facts and reasonable inferences to draw from them to suspect occupants have or will engage in criminal activity). This test is less rigorous than the standard for probable cause. *Commonwealth* v. *Carrasquilla*, 30 Mass. App. Ct. 783, 785 (1991), *rev. denied*, 411 Mass. 1101 (1991). Police avoidance is grounds for detainment. *Commonwealth* v. *Marrero*, 33 Mass. App. Ct. 440, 443 (1992). In *Commonwealth* v. *Battle*, 365 Mass. 472, 475 (1974), the Supreme Judicial Court discussed the officer's *duty* to follow those who flee upon the sight of police. Addressing a similar situation, Justice Scalia offered "that it would be unreasonable to stop, for a brief inquiry, young men who scatter in panic at the sighting of police is not self-evident, and arguably contradicts proverbial commonsense." *California* v. *Hodari D*, 499 U.S. 621, 623 (1991). In the present case, respondents had a duty to conduct an investigatory stop of the suspects. The lower court made this determination and even the petitioner's expert agreed. (A. 318).

2. The Attempted Stop

Once the suspects started to drive off, the officers made a U-turn and approached the rear of the suspect's vehicle. At some point beyond Clementine Park, while driving west, the officers momentarily activated the emergency lights and siren expecting the suspects to stop. The suspects were then going approximately 20-25 miles per hour and there were no pedestrians or vehicular traffic in the area. (A. 521-23). Although the officers expected the suspects to stop, the suspects did not. In the mindful words of Justice Scalia ". . . policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun. . . ." *Hodari D*, 499 U.S. at 627. In the seconds that transpired up to this point there was no hint of negligent or misguided conduct. It was plainly good police work.

3. The Initiation of the Pursuit

The suspects did not stop for the officers' show of police authority. Instead, they accelerated to 30 to 40 miles per hour. (A. 523). The officers followed and again put on their police siren and emergency lights in an effort to stop the suspects. Almost immediately the officers witnessed the suspects place small items in their mouths and pass a jug of water back and forth. (A. 527). The detectives knew that ingestion was a favored means of drug disposal used by drug dealers in the area (A. 583-86); that local drug dealers typically carried only small "stashes" of drugs which they hide at various places in the neighborhoods (A. 583-86); and that drug dealers would typically submit to police authority once the drugs that they had were ingested (A. 553-55, 1019-23, 1054-58). Based on the suspects' actions and respondents' experience the officers determined that they had probable cause to arrest the suspects

for dealing in drugs. *See Beck* v. *U.S.*, 385 U.S. 293 (1966); *Commonwealth* v. *Rivera*, 534 N.E.2d 24 (1989) (the facts and circumstances used to determine probable cause are to be reviewed by what they mean to the officer — not the ordinary layman). The officers notified the police dispatchers that they were engaged in a pursuit. (A. 582). There was no pedestrian or vehicular traffic in that area. (A. 545-46).

4. The Continuation of the Pursuit

The officers continued to pursue the suspects on Centre Street heading to Washington Street. It is important to note that at the time the officers decided to engage in and continue the pursuit they were not acting to conduct a threshold inquiry. The officers had more than an intuitive sense that the suspects were drug dealers. The officers perceived facts upon which they were certain that the suspects were drug dealers. (A. 528). These facts included the suspicious behavior, the failure to stop, the ingestion of small packets and the passing of a jug of water. The decision to pursue was distinct from the decision to conduct a threshold inquiry.

Respondents also concluded that the suspects would submit to police authority once the drugs were ingested. It is commonplace for drug dealers to submit to police authority once they've ingested drugs. (A. 553-55). The suspect's driving conduct reinforced the respondents' conclusion that the suspects would eventually stop. Suspects wanting to elude capture drive quickly and recklessly. These suspects drove at a steady 30 to 45 miles per hour and stayed on the right hand side of the road. (A. 1054-58).

When the suspects approached Washington Street their vehicle went into the left lane of Centre Street to bypass several cars waiting at a red light. They entered Washington Street,

turned left and struck the petitioner Marie Evans as she crossed Washington Street near Epping Street, approximately 300 feet away from Centre Street. (A. 1020). There is a factual dispute whether the officers stopped before entering Washington Street. Viewing the facts most favorable to the petitioner the police entered Washington Street right behind the suspects.

Given the above facts and viewing them in the light most favorable to the petitioner, the officers' conduct did not amount to wanton or reckless conduct directed toward Marie Evans. The officers did consider safety. (A. 546, 639, 1055). They also considered the seriousness of the suspects' crime. (A. 545-46). Respondents had to make quick judgments about their own safety and public safety.

This was a close case on the negligence claim but was far from a willful, wanton or reckless indifference claim. Therefore, the First Circuit correctly ruled that petitioner's claims could not survive because they amount to no more than possible negligence.

CONCLUSION

For all the foregoing, the respondents oppose the petition for writ of certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

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